

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: SB 476

INTRODUCER: Senator Saunders

SUBJECT: Guardians/Background History

DATE: March 7, 2006

REVISED: 03/09/06

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cibula</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/1 amendment</u>
2.	<u></u>	<u></u>	<u>CJ</u>	<u></u>
3.	<u></u>	<u></u>	<u>JA</u>	<u></u>
4.	<u></u>	<u></u>	<u></u>	<u></u>
5.	<u></u>	<u></u>	<u></u>	<u></u>
6.	<u></u>	<u></u>	<u></u>	<u></u>

## Please see last section for Summary of Amendments

- Technical amendments were recommended
- Amendments were recommended
- Significant amendments were recommended

### I. Summary:

This bill increases the background screening requirements imposed on professional guardians and certain of their employees. The bill also creates a process to notify the Statewide Public Guardianship Office of the arrest of a guardian.

This bill substantially amends section 744.3135, Florida Statutes.

### II. Present Situation:

#### Guardianship

A guardian is a surrogate decision-maker appointed by the court to make either personal and/or financial decisions for a minor or for an adult with mental or physical disabilities. After adjudication, the subject of the guardianship is termed a "ward."

Florida law requires the court to appoint a guardian for minors in circumstances where the parents die or become incapacitated, or if a child receives an inheritance or proceeds of a lawsuit or insurance policy exceeding the amount allowed by statute.

Adult guardianship is the process by which the court finds an individual's ability to make decisions so impaired that the court gives the right to make decisions to another person. Guardianship is only warranted when no less restrictive alternative – such as durable power of attorney, trust, health care surrogate or proxy, or other form of pre-need directive – is found by the court to be appropriate and available.

Florida law allows both voluntary and involuntary guardianships. A voluntary guardianship may be established for an adult who, though mentally competent, is incapable of managing his or her own estate and who voluntarily petitions for the appointment.

Legislative intent establishes that the least restrictive form of guardianship is desirable. Accordingly, Florida law provides for limited as well as plenary adult guardianship. A limited guardianship is appropriate if the court finds the ward lacks the capacity to do some, but not all, of the tasks necessary to care for his or her person or property; and if the individual does not have pre-planned, written instructions for all aspects of his or her life. A plenary guardian is a person appointed by the court to exercise all delegable legal rights and powers of the adult ward after the court makes a finding of incapacity. Wards in plenary guardianships are, by definition, unable to care for themselves.

Whether one is dealing with a minor whose assets must be managed by another or an adult with a disability who is not capable of making decisions for him/herself, when the court removes an individual's rights to order his or her own affairs there is an accompanying duty to protect the individual. One of the court's duties is to appoint a guardian. All adult and minor guardianships are subject to court oversight.

The legal authority for guardianship in Florida is found in Chapter 744, Florida Statutes. The court rules that control the relationships among the court, the ward, the guardian, and the attorney are found in Part III, Probate Rules, Florida Rules of Court. Together, these statutes and rules describe the duties and obligations of guardians and attorneys, as well as the court, to ensure that they act in the best interests of the ward, minor, or person who is alleged incapacitated.<sup>1</sup>

### **Guardian Background Screening**

Existing s. 744.3135, F.S., provides that a court may require nonprofessional guardians to submit to an investigation of their credit history and level 2 background screening. Courts must require professional and public guardians and some of their employees to undergo the credit history investigation and the level 2 background screening. Credit history investigations and level 1 background screening for professional and some of their employees must take place at least every two years. Guardians and their employees may be required to submit to a credit history

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<sup>1</sup> Supreme Court Commission on Fairness, Committee on Guardianship Monitoring, *Guardianship Monitoring in Florida: Fulfilling the Court's Duty to Protect Wards* 5 (2003) at <http://www.floridasupremecourt.org/>.

check and level 1 background screening at any time. Fingerprints taken as part of the background screening currently are not retained by the Florida Department of Law Enforcement.

Level 1 and Level 2 Background Checks are terms used in Florida Statutes to convey the method of the criminal record check and the extent of the data searched, however, the terms may also refer to certain disqualifying offenses if certain statutes are used as reference. Level 1 and Level 2 are terms that pertain only to Florida and are not used by the FBI or other states. They are defined in Chapter 435, F.S., but are used elsewhere in statute without definition and appear not to be associated with all of the provisions in Chapter 435.

- Level 1 generally refers to a state only name based check AND an employment history check.
- Level 2 generally refers to a state and national fingerprint based check and consideration of disqualifying offenses, and applies to those employees designated by law as holding positions of responsibility or trust. Section 435.04, mandates that Level 2 background security investigations be conducted on employees, defined as individuals required by law to be fingerprinted pursuant to Chapter 435.

It should be noted that both the state and national criminal history databases can be searched for arrests, warrants, and other information pertaining to an individual, however, neither database has the capability of searching for specific offenses on an individual record.<sup>2</sup>

The cost of level 1 screening is \$23. A level 2 screening costs \$47.<sup>3</sup>

### III. Effect of Proposed Changes:

This bill increases the background screening requirements imposed on professional guardians and certain of their employees. The bill also creates a process to notify the Statewide Public Guardianship Office of the arrest of a guardian.

Under the bill, professional guardians and their employees who have a fiduciary responsibility to a ward must have a level 2 background screening every five years. The bill provides that fingerprints for the background screening may be submitted to the FDLE on a fingerprint card or electronically. When fingerprints are submitted on a fingerprint card, they are not retained by the FDLE. When fingerprints are submitted electronically, they will be retained by the FDLE, starting December 15, 2006. The bill further provides that these electronic fingerprints may be used for the same purposes for which fingerprints taken during arrests are used. As such, when a person is arrested, his or her fingerprints must be compared to the retained electronic fingerprints of guardians. If the arrested person is identified as a guardian, the arrest record must be

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<sup>2</sup> Florida Department of Law Enforcement, Criminal History Record Checks/Background Checks: Fact Sheet (Sept. 1, 2005) at [http://www.fdle.state.fl.us/jla/attach/JLA\\_Background\\_FAQ.pdf](http://www.fdle.state.fl.us/jla/attach/JLA_Background_FAQ.pdf).

<sup>3</sup> *Id.*

forwarded to the clerk of court. The clerk then must forward the arrest record to the Statewide Public Guardianship Office.

This bill takes effect July 1, 2006.

#### **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

#### **V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

Under the bill, guardians may be charged a fee of up to \$10 for the use of electronic fingerprinting equipment. The bill also requires guardians and their employees undergo level 2 background screenings every five years. The current cost of a level 2 background screening is \$47. The expense of the credit investigations and background screening is born by guardians and their employees. For guardians who submit their fingerprints electronically, the Florida Department of Law Enforcement (FDLE) may impose an annual fee of up to \$10 for notifying the clerk of court that a guardian has been arrested. Lastly, the bill authorizes the Statewide Public Guardianship Office (SPGO) to charge guardians and their employees up to \$25 for conducting credit investigations.

B. Private Sector Impact:

The increased frequency of credit history investigations and background screenings may lead to the removal of more guardians.

C. Government Sector Impact:

The FDLE will have to conduct more background screenings and will have to notify court clerks when certain guardians get arrested.

The SPGO has the authority under the bill to adopt rules for credit history investigations and may conduct the investigations.

Court clerks must maintain files on court appointed guardians. Clerks must also notify the SPGO that a guardian has been arrested.

**VI. Technical Deficiencies:**

The bill authorizes the Statewide Public Guardianship Office to “inspect . . . the results of any . . . criminal investigation of a . . . guardian conducted under this section.” The section prescribes background screenings rather than criminal investigations. The Legislature may wish to revise the bill accordingly.

**VII. Related Issues:**

Existing law requires professional guardians and their employees to undergo level 1 background screening at least every two years. The bill requires these individuals to undergo level 2 screenings at least every five years. As such, the first two background screenings are spaced at two-year intervals, then screenings are required three years in a row. The Legislature may wish to amend the bill to require level 2 screenings every four or six years. This change would enable a level 2 screening to replace a level 1 screening.

The bill and existing law contemplate that guardians and certain of their employees be fingerprinted and undergo background screenings. Both the bill and existing law, however, describe fingerprinting procedures that may be applicable to guardians only. The Legislature may wish to amend the bill to clarify that the fingerprinting procedures apply to both guardians and their employees that need to be fingerprinted.



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## VIII. Summary of Amendments:

### **Barcode 422104 by Judiciary:**

Makes a technical amendment by replacing the word “or” with “and.” The change clarifies that a person must pay costs incurred by both the Federal Bureau of Investigation and the Florida Department of Law Enforcement.

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This Senate staff analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

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